

No. 83-1302

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**In the Supreme Court of the United States**

OCTOBER TERM, 1983

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GUILLERMO T. NAVA, PETITIONER

v.

MERIT SYSTEMS PROTECTION BOARD

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*ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE FEDERAL CIRCUIT*

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**MEMORANDUM FOR THE RESPONDENT IN OPPOSITION**

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## **MEMORANDUM FOR THE RESPONDENT IN OPPOSITION**

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Petitioner challenges an order of the court of appeals denying his motion for leave to file an untimely appeal from a decision of the Merit Systems Protection Board (MSPB).

1. On February 15, 1980, petitioner, a Customs Patrol Officer, was arrested on a charge of driving while intoxicated (Pet. 1). The Customs Service found that in connection with this incident, petitioner had violated a provision in the Customs Service Policy and Procedures Manual that requires employees who are arrested or detained in connection with a violation of federal, state or local law, promptly to report the arrest to a supervisor by the most expeditious means available (Pet. 3). After petitioner was given an opportunity to respond to the charges, a final decision was

made to remove petitioner from employment, effective July 11, 1980.<sup>1</sup>

2. Petitioner appealed to the MSPB pursuant to 5 U.S.C. 7701. Following a hearing in which petitioner raised a claim of discrimination on the basis of national origin (Mexican-American) and challenged the substance of the charge, the presiding official issued a decision affirming the agency's decision. On April 7, 1983, the Board denied petitioner's request for rehearing (Pet. App. 2-4).

On April 29, 1983, petitioner attempted to appeal from the Board's decision by filing a pro se lawsuit in the United States District Court for the Southern District of Texas (C.R. 1).<sup>2</sup> By order dated June 13, 1983, the court informed petitioner that if the basis of his complaint was a claim of discrimination, then review would lie in the district court under 5 U.S.C. 7703(b)(2); on the other hand, if his claim was only that the MSPB's decision on the issues other than discrimination was incorrect, jurisdiction would lie in the court of appeals under 5 U.S.C. 7703(b)(1). The district court also informed petitioner that although the complaint alleged discrimination and retaliation, such claims were unsupported by factual allegations and the essence of his claim appeared to be that the agency's decision removing him was not supported by substantial evidence. The court therefore ordered that petitioner be allowed additional time to amend his complaint to allege facts supporting his discrimination claim, if he chose to do so (C.R. 4).

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<sup>1</sup>The agency considered two previous disciplinary actions taken against petitioner in arriving at the decision to remove him. See Decision of the MSPB presiding official, November 28, 1980 (at 8-9) (lodged with the Clerk of the Court).

<sup>2</sup>"C.R." refers to the documents in the clerk's record of the proceedings filed by petitioner in the district court (No. L-83-63).

Petitioner did not amend his complaint to allege discrimination. Instead, he obtained a stay of the district court proceedings and, now represented by counsel, filed a motion for leave to file an untimely appeal in the United States Court of Appeals for the Federal Circuit. The court of appeals denied that motion by order dated November 9, 1983 (Pet. App. 1). In its order, the court noted that by statute, 5 U.S.C. 7703(b)(1), petitioner's appeal should have been filed in the court of appeals no later than May 1983, 30 days after petitioner received notice of the MSPB's final decision in April 1983. The court held that the "statutory time limit for appeals cannot be waived by this court" (Pet. App. 1).<sup>3</sup>

3. The court of appeals correctly rejected petitioner's effort to file an untimely appeal. Its decision does not warrant review by this Court.

Pursuant to 5 U.S.C. 7703(b)(1), a petition to review a final order or decision of the MSPB — except in cases involving allegations of discrimination — must be filed in the court of appeals "within 30 days after the date the petitioner received notice of the final order or decision of the Board."<sup>4</sup> In this case, the Board's decision was issued on

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<sup>3</sup>On November 29, 1983, petitioner moved in the district court to dismiss his complaint. By order filed the same day, that motion was granted (C.R. 10-11).

<sup>4</sup>The Federal Courts Improvement Act of 1982 vests the Federal Circuit with exclusive jurisdiction over petitions for review of a final order of the MSPB. § 127(a), 28 U.S.C. 1295(a)(9). However, in "mixed cases," which involve allegations of discrimination as well as challenges to the adverse personnel action, jurisdiction lies exclusively in the district court. 5 U.S.C. 7703(b)(2); *Williams v. Department of Army*, 715 F.2d 1485, 1489 (Fed. Cir. 1983) (en banc). In this case, since petitioner apparently did not wish to pursue his discrimination claim, judicial review of the MSPB's decision affirming his removal rested exclusively in the Federal Circuit. See *Christo v. Merit Systems Protection Board*, 667 F.2d 882 (10th Cir. 1981) (court of appeals "has

April 7, 1983, and petitioner did not attempt to file a notice of appeal to the Federal Circuit until September 28, 1983. The court of appeals was therefore plainly correct in holding that petitioner had failed to comply with the statutory time limit. Petitioner asserts that the court of appeals erred in denying his motion to file out of time since petitioner "diligently filed an appeal within the time limitation but, unfortunately in the wrong court" (Pet. 6).<sup>5</sup> Contrary to petitioner's contention, the court of appeals lacks the power to extend the statutory time limit for equitable reasons because "[t]he filing requirement is jurisdictional." *Boehm v. Foster*, 670 F.2d 111, 113 (9th Cir. 1982). See also *Billops v. Department of the Air Force*, 725 F.2d 1160, 1163 (8th Cir. 1984); *Miller v. United States Postal Service*, 685 F.2d 148, 149 (5th Cir. 1982), cert. denied, No. 82-6291 (May 2, 1983).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE  
Solicitor General

APRIL 1984

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jurisdiction, under [5 U.S.C. 7703(b)(1)], \* \* \* only over those cases seeking review of final agency action in which no claim of discrimination has been preserved for judicial review").

<sup>5</sup>Petitioner commenced his action in the district court within the 30 day statutory period (5 U.S.C. 7703(b)(2)). Had he not withdrawn his complaint (see note 3, *supra*), petitioner could have sought to transfer his action to the court of appeals pursuant to 28 U.S.C. 1631. That provision grants federal courts power to transfer cases over which they lack jurisdiction to the "court in which the action or appeal could have been brought at the time it was filed or noticed," if a transfer would be "in the interest of justice."